STATE OF ILLINOIS
LIQUOR CONTROL COMMISSION

In the Matter of City Beverage – Markham, LLC, *et al.*	)	12 CCH 01

RESPONDENTS' RESPONSE TO THE LEGAL DIVISION'S AND OTHER NON-PARTIES' PRE-HEARING SUBMISSIONS

In March of 2010, the Legal Division foisted an interpretation of the Liquor Control Act (the "LCA") upon the ILCC that was contrary to decades of ILCC licensing history, incorrect as a matter of state law, and unconstitutional as a matter of federal law. As a result, the ILCC ruled that WEDCO was unable to acquire full ownership of CITY Beverage but could keep its longstanding 30% interest. Since 2010, it has become increasingly clear that the Legal Division is on a quest to create any legal justification for the erroneous and unsupportable legal interpretation it gave originally to the ILCC. Now, in these proceedings under the Amended Citation, the Legal Division (still flanked by obviously self-interested industry participants) grasps for any legal theory that will meet its ultimate objective.

This time, the Legal Division relies largely on the Craft Brewer Act (the "CBA"). But, just as in 2010, the Legal Division is simply wrong on the law because the CBA did not accomplish that which the Legal Division and Anheuser-Busch's competitors hoped it would. The CBA created no prohibition against WEDCO maintaining an indirect, minority interest in a distributor. Rather, the CBA eliminated in-state brewers' ability to engage in self-distribution and created a self-distribution exemption for craft brewers. Nothing more. If the CBA had done more it would have added brewers to the prohibited interests set forth in Section 5/6-4(a) of the LCA. The fact that Section 5/6-4(a) has never, even after the CBA, applied to brewers renders *all*

of the Legal Division's theories on the alleged prohibitions in the LCA, and the effect of the CBA, simple nullities.

Thus, the ILCC is faced with a law that, by its plain language, does not affect a brewer's right to own an interest in an Illinois distributor. This time around, the ILCC should reject the Legal Division's erroneous statutory interpretation and issue a ruling based upon the text of the statute. The plain language rule of statutory construction "emphasizes the statutory language as written" and it is error to read into the law additional "exceptions, limitations, or conditions." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 149, 152 (1997). "[I]ntent without a supporting text is not law." *Scattered Corp. v. Chicago Stock Exchange, Inc.*, 98 F.3d 1004, 1005 (7th Cir. 1996).[1]

Because nothing has changed either factually or legally since March 10, 2010, with respect to WEDCO's interest in CITY Beverage, the ILCC should reaffirm Declaration B of the Declaratory Ruling dated March 10, 2010, by dismissing the Amended Citation. There could be no appeal of the dismissal of the Amended Citation.

There is no reason for the ILCC to reconsider the result it reached in Declaration B. However, if the ILCC does so, it also should reconsider Declaration A. In that regard, Respondents have demonstrated that the plain terms of the LCA contain no prohibition on brewer ownership of distributors. Moreover, the ILCC should take note of new information in

[1] It is also well-established that the plain language of the statute controls over comments made during floor debates. *Bogseth v. Emanuel*, 166 Ill. 2d 507, 511-13 (1995) (rejecting reference to statements made during floor debates to determine legislative intent because the language of the statute is considered the primary source to determine its meaning).

WSDI's submission and major concessions in the Legal Division's brief that demonstrate that Declaration A was wrong.

First, in a remarkable reversal, WSDI now agrees that there was *not* any prohibition on Anheuser-Busch owning a distributor in 2010. In other words, according to WSDI, everything the Legal Division told the ILCC in 2010 and all of the ILCC action in 2010 was wrong. WSDI states:

> At the time AB sued the ILCC in Federal court to enforce its purported "right" to acquire the outstanding 70% of the stock of CITY, nothing in the Act suggested that it was unlawful for manufacturers situated outside of Illinois to obtain a Brewer's License. While it has been asserted by legal counsel for the ILCC that the creation of the NRD License thereafter prohibited such licensure, this interpretation finds no support in either the Act, or in any case law construing it. To the contrary, a review of the Act and its evolution since 1982 reveals no legal impediment to an out-of-state manufacturer obtaining an Illinois Brewer's License until 2011. Thus, until as recently as last year, AB remained free to seek licensure as an Illinois Brewer, which would then have qualified it to hold an Illinois Distributor's License.

(WSDI submission dated Sep. 7, 2012 at 2-3.)[2]

Of course, Anheuser-Busch was unable to obtain a distributor's license in 2010 through any means because the Legal Division asserted that out-of-state brewers were ineligible to hold either a Brewer's License or a distributor's license. (Haymaker Mem., dated Mar. 1, 2010, at 2.) The Legal Division's position that a Brewer's License was limited to in-state brewers created the discrimination against interstate commerce that necessitated the federal court action that found that the ILCC violated the federal constitution. But the remarkable thing is that WSDI now corroborates what Respondents have said to the ILCC for the past 2 ½ years: nothing in the

[2] In addition to analyzing the statute, WSDI examined the legislative history surrounding the 1982 amendment and concluded that it "is clear that it was *never* the intent of the General Assembly to prohibit the licensure of out-of-state manufacturers." (WSDI submission, dated Sep. 7, 2012, at 3 (emphasis in original).)

1982 NRD amendment, the distributor definition, the three tier system, the "act of authorization perspective," the "Stanton doctrine," or TPP 39 created any prohibition on brewers owning distributors. In other words, in 2010, the LCA contained no prohibition of any type that supported the ILCC blocking WEDCO's acquisition of an additional 70% interest in CITY Beverage. Declaration A was wrong as a matter of law.[3]

And now, after telling the ILCC for more than two years that the LCA unambiguously prohibited WEDCO's interest in CITY Beverage, the Legal Division has reversed itself on that position. The Legal Division now contends that the LCA is "ambiguous" as to whether brewers may own distributors, stating that it "recognizes the legitimacy of the ambiguity of the Act." (Legal Division Response to Motion to Dismiss at 3-5; Legal Division Discovery Response at 5.) In its pre-hearing brief, the Legal Division states that "the Act is silent on whether or not [NRDs and distributors] can or cannot be commonly owned." (Legal Division Mem. at 11.) Thus, the Legal Division now contends that the ILCC must consult a variety of external sources to find a relevant prohibition. The Legal Division's reversal in position is an admission that the interpretation it tendered to the ILCC in 2010 was wrong.

But there is more. The Legal Division now concedes that under its view, Section 5/6-4(a) and other prohibitions in the LCA are superfluous, which is an admission that ends all debate about the proper interpretation of the LCA. Respondents have consistently explained that the LCA does not set forth general categories of who is eligible to receive various licenses, but is instead filled with licensing *prohibitions* that make no sense under the Legal Division's

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[3] WSDI's call for the ILCC to refer this matter to various federal and state agencies is merely its biased an attempt to divert the ILCC from the issues germane to the Amended Citation. WSDI's suggested actions are inconsistent with the charges set forth in the Amended Citation.

interpretation of the definition of distributor, its illusory "three-tier" argument, and "act of authorization" approach. Most critically, Section 5/6-4(a) prohibits distillers and winemakers from owning distributors. The General Assembly has never added brewers to this list and thus brewers may own distributors. The sections of the LCA containing such licensing prohibitions, which bear titles such as "Persons Ineligible to be Licensed" and "Prohibited Transactions and Interests," would be wholly unnecessary if the statute prohibited licensing eligibility that is not expressly authorized.[4]

The Legal Division has never been able to explain why the LCA contains prohibitions if it prohibits everything that it does not permit, or why its interpretation of the definition of distributor makes sense in light of Section 5/6-4(a). The Legal Division now concedes that under its view, there *is no explanation*. In referring to Section 5/6-4(a), the Legal Division states:

> While it is true that the Legislature has taken an additional step to specifically prohibit distillers and wine manufacturers from being distributors, we agree that the additional prohibitions are *superfluous*.

(Legal Division submission dated Sep. 7, 2012 at 12 (emphasis added).)

This concession demonstrates that the Legal Division's current statutory interpretation violates a primary rule of statutory construction. *See Ultsch v. Ill. Mun. Ret. Fund*, 226 Ill. 2d 169, 187 (2007). "One of the fundamental principles of statutory construction is to view all of the provisions of a statute as a whole. Words and phrases should not be construed in isolation, but

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[4] The ABDI's spin on Section 5/6-4(a) is perhaps the most fanciful theory of all. According to ABDI (at least in this proceeding) Section 5/6-4(a) is not a *prohibition* at all, but is instead a limited, 5% ownership *privilege* for winemakers and distillers in the face of an otherwise unstated but complete prohibition against manufacturers owning a distributor. ABDI Submission, dated Sep. 7, 2012, at 3. This is the same ABDI that, in 1999, attempted to *add* brewers and NRDs to the categories of licensees listed in Section 5/6-4(a) to prevent them from owning an interest in a distributor. S.B. 781, 91st Gen. Assembly, Reg. Sess. (Ill. 1999). ABDI's suggestion that Section 5/6-4(a) is anything other than a clear, unambiguous prohibition as to winemakers and distillers (but not brewers) is truly incredible.

interpreted in light of other relevant portions of the statute so that, if possible, no term is rendered *superfluous* or meaningless." *Id.* (internal quotation marks and alterations omitted and emphasis added).[5] On that basis alone, the ILCC should reject the Legal Division's interpretation and dismiss these proceedings.

Enough is enough. In 2010 the ILCC heeded the Legal Division's advice and blocked WEDCO's acquisition of the full ownership of CITY Beverage. But, WEDCO was allowed to maintain its historical 30% interest. The ILCC should be skeptical of accepting the new, ever-evolving legal interpretations from the Legal Division and Anheuser-Busch's competitors because time and again they have been proven wrong. Respondents, on the other hand, have relied on the ILCC's licensing decisions over many years in acquiring and retaining the 30% interest in CITY Beverage and would be significantly harmed by a forced sale. No one has produced evidence of any harm from this minority interest. Indeed, the ILCC already ruled on WEDCO's 30% interest. To achieve the correct equitable and legal result, the ILCC need only reaffirm Declaration B of the Declaratory Ruling dated March 10, 2010, by dismissing the Amended Citation.[6]

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[5] Sections 5/6-2(a)(10) and (11) are also inapplicable here. First, these sections have not changed since March 2010, and thus cannot be a basis to reconsider Declaration B. Moreover, these provisions are not alleged by the Legal Division to be an independent basis for a prohibition against WEDCO holding its interest in CITY Beverage. In fact, the Legal Division cites these sections only for the proposition that if the ILCC finds that the LCA prohibits a brewer from holding a distributor license, then that prohibition must be extended to WEDCO as an alleged "manager" of CITY Beverage or 5% owner. Respondents incorporate their filings dated January 5, 2012, and July 23, 2012, which addressed the inapplicability of these provisions in more detail. Finally, Respondents note that there is nothing unusual about WEDCO's right to approve managers of CITY Beverage. The right for a brewer to approve its distributor's manager is standard in the industry. Regardless of whether WEDCO has an interest in a distributor, A-B LLC has such a right in its wholesaler agreement. Indeed, MillerCoors's wholesaler agreements also give it the right to approve the managers of its distributors, regardless of whether MillerCoors owns an interest in that distributor. This right does not make A-B LLC and MillerCoors managers of every distributor in Illinois.

[6] On July 18, 2012, the Legal Division filed a motion for summary judgment. The motion intentionally omitted any legal analysis. Now, two months later and well after the deadline for the filing of motions, the Legal Division files a memorandum in support of its motion, in lieu of filing a true pre-hearing brief. This brief is *(cont'd)*

CONCLUSION

For the reasons set forth herein and in Respondents' motion to dismiss, the ILCC should dismiss the Amended Citation.

Dated: September 21, 2012

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untimely. Moreover, the motion is improper at the current time because both the LCA and Administrative Procedure Act entitle Respondents to a hearing. The Legal Division's motion for summary judgment in effect seeks to summarily revoke Respondents' licenses prior to holding the hearing that is a fundamental element of due process and mandated under the LCA and Administrative Procedure Act. The LCA specifically provides that no license may be "revoked or suspended except after a hearing by the [ILCC] with reasonable notice to the licensee . . . and after an opportunity to appear and defend." 235 ILCS 5/7-6. Likewise, the Administrative Procedure Act provides that "[i]n a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice. . . . An opportunity shall be afforded to all parties to . . . respond and present evidence and argument." 5 ILCS 100/10-25(a) and (b). This requirement of a formal hearing before revoking a liquor license is more than a legal technicality—it is a fundamental element of due process. *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill.2d 367, 408 (1992) ("Among the guarantees without which there would be an absence of procedural due process are reasonable notice, the right to examine witnesses, to testify, to present witnesses, and to be represented by counsel. . . . [D]ue process of law guarantees a fair and impartial hearing."). Summary judgment here would deprive Respondents of that hearing. Respondents otherwise incorporate herein the arguments raised in their motion to strike the Legal Division's motion for summary judgment.

Proof of Service

Now comes the undersigned, an attorney, and does hereby state that the above submission was served on September 21, 2012, and was served via e-mail and hand delivery on Stephen B. Schnorf, Michael V. Casey, and Richard Haymaker, Illinois Liquor Control Commission, at 100 W. Randolph St., Room 7-801, Chicago, IL 60601.

/s/ Edward M. Crane
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